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No. 84-1845

In the Supreme Court of the United States

OCTOBER TERM, 1984

OLIVE SORENSEN,

Petitioner,

v.

AUBREY A. FITZGERALD, Trustee,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OLIVE SORENSEN, Petitioner, vs. AUBREY A. FITZGERALD, Trustee, Respondent.	)	No. 84-1845 PETITIONER'S REPLY BRIEF

It is too late for Respondent to shift from 11 U.S.C. #547 to #550 in order to give the bankruptcy court needed jurisdiction.

All for the want of a tangible res, Respondent-Trustee suddenly finds himself without jurisdiction for his proceeding brought under 11 U.S.C. 547. So, in desperation, he surprisingly for the first time injects 11 U.S.C. 550 into this case in an attempt to save his void judgment. It is too late as a reading and understanding of section 550 will show.

First, however, Respondent is to be commended for candidly conceding that his purpose in commencing the adversary

proceeding under 11 U.S.C. 547 was to retrieve (R.Br. p3,4) the $20,000 cash fund (R. Br. 1) which debtors had transferred to Petitioner as a preference. Since the $20,000 fund was completely dissipated by Petitioner before June 10, 1982, when the bankruptcy petition was filed, there was no specific property upon which the bankruptcy court could exercise its exclusive in rem jurisdiction under 28 U.S.C. 1471(e). Nor, did Petitioner have possession of any $20,000 fund to turn over to the trustee. Maggio v Zeitz, Trustee in Bankruptcy, 33 U.S. 56, (1948).

So now let us understand the purpose and use of Section 550. It reads:

> "550. LIABILITY OF TRANSFEREE OF AVOIDED TRANSFER."
>
> "(a) . . . to the extent that a transfer is avoided under sections . . .547. . . of this title . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . .

> "(1) the initial transferee of such transfer . . ."
> (Underlining ours)

To begin with, 550 is not a substitute for or expansion of 547. Section 550 is intended only to authorize the court to impose personal liability upon the transferee of property after the transfer has been avoided under 547 and then only where it appears necessary or equitable to do so. It is a tool for the court and trustee to use during a proceeding. As held in In Re Cove Patio Corp.,(Bk. S.D. Fla. 1982) 19 B.R. 843 at 844:

> ". . .Section 550(a)(1) was not intended to expand the trustee's right to recover preferences as provided in #547, but was intended only to facilitate his recovery of transfers avoidable under #547. . ."

In keeping with the clear language of 550, the section can only be invoked by the bankruptcy court in exercise of its discretion. Discretion is an implied necessity. Matter of R.A. Beck Builder,

Inc., (Bk. W.D.Pa. 1983) 34 B.R. 888, 894.

Next it should be pointed out that Congress heeded the teaching of this Court in Maggio, supra, when it fashioned 550 as part of the 1978 Bankruptcy Reform Act. Congress understood the fine line separating need for in rem jurisdiction when ordering a person to turnover property and the need for in personam jurisdiction when imposing liability upon a person for failure to turnover property. As the Committee on the Judiciary noted in Senate Report No. 95-989, Section 550:

> "Section 550 prescribes the liability of a transferee of an avoided transfer, and enunciates the separation between concepts of avoiding a transfer and recovering from the transferee. . ." (11 U.S.C.A. #550)

Use of section 550 can best be described by likening it to the gear-shift in an automobile. Imagine that the trustee is driving up a hill to reach a transferee of

property and get it back for the benefit of the estate. The trustee is proceeding in the high gear of 547 only to discover he can't make the grade because the transferee has disposed of the property. At that point the trustee can ask the court to shift into low gear of 550 so he can reach the transferee and make he or her personally liable for the value of the property. The key to the gear-shift is an order of the bankruptcy court which in its discretion permits it to shift into low gear of 550 if it believes it to be necessary or equitable.

It is too late for Respondent to now ask this Court to shift gear or remand the case to the bankruptcy court so Respondent can start all over again by alleging jurisdiction under 550 instead of 547. There are several reasons:

Since the bankruptcy court avoided the transfer by its judgment entered May 3, 1983, a start all over again is barred by the one

year statute of limitations in section 550 (e) which reads:

> "550(e) An action or proceeding under this section may not be commenced after the earlier of--
>
> "(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and
>
> "(2) the time this case is closed or dismissed."

Any nunc pro tunc order to permit Respondent to return to the bankruptcy court would be repugnant to the established principle that jurisdiction of every federal court is measured at the time a plaintiff files his original complaint and upon the allegations therein.

In any event, Respondent should be estopped from claiming 550 as a jurisdictional base for his $20,000 judgment against Petitioner. The record can show that Respondent took the deposition of Petitioner before he filed his amended complaint and learned of her both receiving $20,000 in cash AND

spending it before the bankruptcy petition was filed. It should be conclusively presumed from their experience that Respondent and his two attorneys knew of the existence of 550 and its use from the very start.

Petitioner should be granted a writ and be awarded attorney fees as part of her costs.

Respondent's belated injection of section 550 into this case gives deep concern to Petitioner. However, the remainder of his responsive brief is both innocuous and irritating. It triggers a renewal of Petitioner's request for an award of attorney fees as part of her costs as made to the Court of Appeals under its Local Rules 14 and 13(b)(1)(E) and authority of Vaughan v Atkinson, 369 U.S. 527 (1962).

For most of three years Petitioner has been challenging the courts by claiming they lacked jurisdiction for not having actual or

constructive possession of a res; first as to the RESTLESS II and second as to the $20,000 cash fund. Not once did Respondent ever argue or give any reason to either the Bankruptcy Court or the U.S. District Court or even mention 11 U.S.C. 550 as a reason for jurisdiction. At all times Respondent and his two attorneys stood mute as did the able Bankruptcy Judge and the able U.S. District Judge. These muting tactics culminated in the U.S. Court of Appeals where it failed to make a "Reasoned disposition" of Petitioner's motion for relief from a void judgment (App. P.B.). Here, Petitioner has challenged the Court of Appeals for acting beyond its Article III jurisdiction. To this challenge Respondent only states on page 6 of his brief:

> ". . .A reasoned decision in this case is both unnecessary and inappropriate."

Had Respondent done his homework he would have discovered that the Court of Appeals for

the District of Columbia vacated a district court judgment because that court had denied defendant's motion to dismiss for lack of jurisdiction without explaining why it did so. In Georgiades v Martin-Trigona, 729 F.2d 831 (D.C. Cir. 1984) the Court held at page 832:

> "(1) The District Court, by fiat, denied. . . motion to dismiss for lack of the requisite amount in controversy,. . . it did not explain why it denied the motion. . . We therefore vacate the judgment."

Finally, the recalcitrance and indifference of Respondent toward Petitioner and the courts is demonstrated by Respondent not making any response whatsoever to Petitioner's contention that the Court of Appeals exceeded its Article III jurisdiction by affirming ~~it~~ the judgment instead of vacating the judgment and ordering the adversary proceeding to be dismissed without prejudice. The court's disposition is contrary to its own en banc decision in Sawyer v Pioneer Mill Co., 300 F.2d 200, (9 Cir. 1962),

certiorari denied in 371 U.S. 814.

Apparently, Respondent, acting as an official trustee of the bankruptcy court is callous and indifferent as to whether or not his judgment against Petitioner is void or that the bankruptcy court acted beyond its jurisdiction as constrained by Article III of the Constitution.

Pray grant a writ and vacate the judgment and dismiss the adverse proceedings without prejudice. An award of attorneys fees as part of costs would be most welcomed.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, Counsel of Record for Petitioner, do hereby certify that I served three (3) true copies of the foregoing PETITIONER'S REPLY BRIEF on the following person at his last known address as set forth under his name by placing said true copies, certified by me as such, in an envelope addressed to him with postage paid and mailed the envelope to him from the U.S. Post Office at Portland, Oregon on the 1st day of October, 1985; there being regular communication by the U.S. Mail from Portland to said address:

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